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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 224

FRANK J. VLCEK and LYDIA P. VLCEK,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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(a)

This Petition for a writ of certiorari is filed to review an order of the Supreme Court of Illinois denying the Petitioners the right to appeal from a judgment of the Appellate Court of Illinois. No opinion was filed by the Illinois Supreme Court, the order reciting that Petition for Appeal "Denied."

The opinion of the Appellate Court of Illinois is appended hereto and is reported in full in *People* v. *Vlcek*, 114 Ill. App. 2d 74, 252 N.E. 2d 377.

(b)

The jurisdiction of this Court is invoked because:

(i) The order of the Supreme Court of Illinois, denying petitioners' appeal was entered March 24, 1970.

(ii) The opinion and decision of the Appellate Court was entered October 24, 1969 and Petition for Rehearing was denied December 1, 1969. Petition for Appeal and Leave to Appeal was filed in the Supreme Court of Illinois on January 2, 1970 within the period allowed by the Rules. The Supreme Court of Illinois as stated above denied the Petition to Appeal from the Appellate Court judgment on March 24, 1970.

(iii) The jurisdiction of this court is invoked because:

1. The Illinois Courts have decided a federal question of substance, namely, the privilege against self incrimination, directly contrary to the spirit and intent of the decisions of this Court, in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, and *Orozco* v. *Texas*, 394 U.S. 324, 22 L. ed. 2d 311, 89 S. Ct. 1095.

2. The Illinois Courts have deprived the petitioners of their constitutional rights under the Fifth Amendment of the Constitution of the United States.

(c)

There is only one question presented for review in this case, namely:

Where statements are obtained from petitioners charged with arson by a person who purports to be a State Fire Marshal, by threats, intimidation, and denying the petitioners the right to have or consult with counsel, are such statements to be suppressed under the Miranda and Orozco cases?

The lower court sustained a motion to suppress these statements under the *Miranda* case. The State appealed and the Appellate Court reversed the lower court on the ground that unless the person is a bona fide Fire Marshal, his representations and holding out that he is a Fire Marshal and that petitioners were reasonably led to believe he is a Fire Marshal are immaterial.

The Illinois Appellate Court and Illinois Supreme Court position is stated in the Appellate Court opinion in 252 N.E. 2d 377, at 380:

> "The defendants, as indicated by their motion and statements to the court, were relying upon *Miranda,* and the court suppressed the statements under that authority. Yet, the admonitions required by *Miranda* are applicable to law enforcement officials—not private persons—*even though the private persons may be posing as law enforcement officials.*" (Italics ours)

We state categorically and the evidence in the record shows conclusively that the person who obtained the statements from petitioners was an insurance claim agent and not a State Fire Marshal but that he held himself out as such. The Appellate Court opinion requires the person to be a *de jure* fire marshal or law enforcement official because the court in its opinion at page 380 says:

> "While the testimony indicates that Kennedy held himself out to the defendants to be a fire marshal, if, in fact, he was not, then it is of no more significance under *Miranda* than if a bank clerk, under the guise of being a police officer, should obtan an incriminating statement from a depositor, in that the custodial procedural safeguards of *Miranda* have application to law enforcement officers only. In the case at bar, the defendant's counsel advised the court that Kennefly was not a fire marshal."

Since we admitted all the time that the person obtaining the statements was not a bona fide State Fire Marshal but only an insurance claim adjuster holding himself out and pretending to be a State Fire Marshal, there was no need for the Appellate Court to remand the case to determine whether he was a State Fire Marshal. We admit that he was not a bona fide State Fire Marshal but he held himself out as a Fire Marshal.

(d)

CONCISE STATEMENT OF MATERIAL FACTS.

The petitioners, Frank J. Vlcek and his wife, Lydia P. Vlcek, were indicted for arson for allegedly burning down their home in Clarendon Hills, DuPage County, Illinois, with intent to defraud the insurer of said house.

Subsequently, a motion to suppress certain statements allegedly made by the petitioners to one, Kennedy, a claim agent for the insurer who held himself out as a Fire Marshal were suppressed by the lower court on the ground of duress, intimidation, denial of the right to see an attorney, and threats contrary to the *Miranda* case safeguards.

The motion to suppress stated *inter alia*:

> "that the said statements obtained by the said John Kennedy from the defendants or either of them were involuntary and in violation of the constitutional rights of the Defendants and each of them, and their right to talk to a lawyer and to be advised of their legal rights."

The State filed no answer, reply, motion to strike, or other pleading or objection to the motion to suppress.

The motion came up for hearing and both petitioners testified, both on direct examination by their attorney and on cross examination by the Assistant State's Attorney prosecuting the case.

The evidence showed conclusively that the alleged statements were obtained by intimidation, threats and duress,

by one, Kennedy, a claim agent for the insurer holding himself out as a State Fire Marshal.

No evidence was offered or introduced by the state to rebut the evidence of petitioners nor that Kennedy did not hold himself out as a State Fire Marshal. Nor was any motion made by the state for a continuance or to introduce any evidence in rebbuttal.

The trial court thereupon entered an order suppressing the alleged statements finding *inter alia*:

> "(a) That one, John A. Kennedy, held himself out to the said Defendants as being the Fire Marshal or that he was connected with the Fire Marshal's office and that he was clothed with the apparent authority of the Fire Marshal's office.
>
> (b) That before the Defendants and each of them were interrogated and statements taken from them, they were not advised of their right to remain silent or of their constitutional right not to be interrogated.
>
> (c) The said Defendants and each of them were not advised of their right to an attorney and were not permitted to obtain an attorney.
>
> (d) The said Defendants and each of them were not advised that anything that they might say at the interrogation could be used against them.
>
> (e) That in the opinion of the court, the said statements are inadmissible and should be suppressed under the decision of the Supreme Court of the United States in the case of *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. (2d) 694."

The State appealed from the order suppressing the alleged statements and the Appellate Court reversed for the reasons heretofore stated, namely that the *Miranda* case holding of this court does not apply to persons who

merely hold themselves out as State law enforcement officials but in fact are not such officials.

The Supreme Court of Illinois denied our petition to appeal from the Appellate Court ruling without comment. This Petition for a Writ of Certiorari is filed to reverse the Supreme and Appellate Court judgments and to affirm the trial court ruling.

(e)

DIRECT AND CONCISE ARGUMENT.

1.

THE APPELLATE COURT OPINION AND JUDGMENT AND THE ILLINOIS SUPREME COURT DENIAL OF OUR APPEAL, IN EFFECT, OVERRULES, LIMITS, MODIFIES AND DILUTES THE DECISIONS OF THIS COURT IN THE MIRANDA CASE AND IN THE OROZCO CASE SO AS TO MAKE A MOCKERY OF THESE DECISIONS.

The Appellate Court decision holds that the person who must advise a person of his rights under the *Miranda* case must be a *de jure* law officer. The fact that Kennedy held himself out as a State Fire Marshal but in fact was not a bona fide State Fire Marshal, although petitioner reasonably believed he was, according to the Illinois Appellate Court deprives the petitioners of the safeguards of the *Miranda* case.

At page 380 the Appellate Court opinion says:

> "Yet the admonitions required by *Miranda* are applicable to law enforcement officials—not private persons—*even though the private persons may be posing as law enforcement officials.*" (Italics ours)

The *Miranda* case makes no such distinction. What the Illinois Appellate Court decision does is to place a burden upon an accused to determine at his peril who is or is not a bona fide state official. For an accused to do this is impossible. To ask that he do this is unreasonable.

Indeed, the burden under Illinois law to prove a confession voluntary is always on the State. *People* v. *McGuire*, 35 Ill. 2d 219, 220 N.E. 2d 447; *People* v. *Wright*, 24 Ill. 2d 88, 180 N.E. 2d 689.

The Illinois Appellate Court decision shifts the burden on the defendant to prove that the official interrogating him is in fact a state official even though he poses as one and has the trappings of a state official. The Illinois Appellate decision goes even further and says he must be a *de jure* state officer and mere holding out as such is immaterial.

We submit that if an accused reasonably believes the person detaining him is a state official and the person doing the detaining has apparent authority to detain him, that is sufficient to bring him under the protection of the *Miranda* case.

Is a person required to verify the *de jure* authority of the detaining official before he comes within the protection of the *Miranda* case? There is no such requirement. Tricking or scaring the Vleeks by the so-called State Fire Marshal, John Kennedy, does not make any information thereby obtained admissible. Otherwise the police could use other individuals not actually police officers to do indirectly what cannot be done directly under the *Miranda* case.

We know of no case which has refused to apply the *Miranda* rule because the detaining official turned out to be a fake or phony State Official.

The Illinois Appellate and Supreme Courts are making new law and imposing conditions and limitations on *Miranda* not contemplated by this Court.

We respectfully submit that the determining fact should be the effect on the accused rather than whether the person purporting to be a policeman or fire marshal is really a policeman or a fire marshal.

Further, this court in *Orozco* v. *Texas*, 394 U.S. 324, 22 L. ed. 2d 311, 89 S. Ct. 1095, broadened the scope of the *Miranda* case by applying the Miranda rule to places away from the police station, and even to interrogations in one's own home.

At page 314, this Court concluded:

> "The *Miranda* opinion declared that the warnings were required when the person to be interrogated was 'in custody at the station *or otherwise deprived of his freedom.*' 384 U.S. 436, 16 L. Ed. 2d 694, 725, 86 S. Ct. 1602, 10 ALR 3rd 974. (Emphasis supplied.)"

Applying these words *mutatis mutandis* to the case at bar the petitioners were deprived of their freedom by a person who purported to act as a law enforcement official. And therefore, as far as petitioners are concerned, Kennedy acted like a law enforcement officer, held himself out as a law enforcement officer, and should be considered a law enforcement officer within the safeguard requirements of the Miranda rule.

CONCLUSION.

The Illinois Supreme and Appellate Court rulings violate and modify *Miranda* and *Orozco*. Only this court should limit or modify its decisions. The Illinois rulings violate the Fifth Amendment as construed by this Court. The trial judge was clearly right in sustaining the Motion to Suppress the alleged statements.

Petitioners respectfully and earnestly pray that this Court grant this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois denying the Petition to Appeal from the Illinois Appellate Court judgment, and thereafter, upon a complete review of the record, that the Circuit Court of DuPage County, Illinois be affirmed and the decisions of the Supreme Court and Appellate Court of Illinois be reversed and the cause remanded with directions to affirm the order of the trial court sustaining the Petition to Suppress.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX

Opinion of the Appellate Court of Illinois, reported in full in 114 Ill. App. 2d 74, 252 N.E. 2d 377:

People of the State of Illinois, Appellant,
v.
Frank J. Vlcek and Lydia P. Vlcek, Appellees.
Gen. No. 69-3.
Second District.
October 24, 1969.

Certificate of importance and rehearing denied Dec. 1, 1969.

1. *Criminal Procedure,* § 334 *—*application of procedural safeguards.*

Custodial procedural safeguards of Miranda decision have application to law enforcement officers only, not private persons, even though private persons may be posing as law enforcement officials.

2. *Criminal Procedure,* § 333.10 *—*statements made to insurer.*

Statements purportedly made when makers thereof, subsequently charged with arson, went to office of representative of insurance carrier, were not subject to motion to suppress as being involuntary and in violation of their constitutional rights as set out in Miranda decision where there was no allegation or proof that representative of insurance carrier was a law enforcement official or was acting upon direction of such officials, since Miranda safeguards have application only to law enforcement officials.

Appeal from the Circuit Court of DuPage County, Eighteenth Judicial Circuit; the Hon. PHILIP LOCKE, Judge, presiding. Reversed and remanded with directions.

* See Callaghan's Illinois Digest, same topic and section number.

(Appellate Court Opinion)

William V. Hopf, State's Attorney of Du Page County, and Helen T. Kinney, Assistant State's Attorney, for appellant.

Irving Goodman, of Chicago, and Carl O. Bue, of Elmhurst, for appellees.

MR. JUSTICE DAVIS delivered the opinion of the court.

The defendants, Frank J. and Lydia P. Vlcek, were charged with arson. They filed a motion pursuant to section 114-11 of the Code of Criminal Procedure (Ill. Rev. Stats. 1967, c. 38, par. 114-11), to suppress certain of their statements on the ground that they were not voluntary. The trial court granted the motion and the State has appealed.

The defendants' motion alleged that John Kennedy, a representative of their insurance carrier, asked them to come to his office relative to settling their fire insurance claim against the carrier; that Kennedy intimidated and threatened them while at his office, denied their request to see a lawyer, and advised them that they better answer his questions if they expected to collect on their insurance; that the intimidation confused the defendant, Frank J. Vlcek; that there may have been a tape recording of the conversation; and that any statements obtained by Kennedy from the defendants were involuntary and in violation of their constitutional rights.

Section 14-11 of the Code of Criminal Procedure relates to motions to suppress confessions and provides in part:

"(a) Prior to the trial of any criminal case a defendant may move to suppress as evidence any con-

fession given by him on the ground that it was not voluntary.

"(b) The motion shall be in writing and state facts showing wherein the confession is involuntary.

"(c) If the allegations of the motion state facts which, if true, show that the confession was not voluntarily made the court shall conduct a hearing into the merits of the motion.

"(d) The burden of going forward with the evidence and the burden of proving that a confession was voluntary shall be on the State. Objection to the failure of the State to call all material witnesses on the issue of the voluntariness of the confession must be made in the trial court."

This matter proceeded before the trial court in a somewhat bizarre manner. Neither the defendants nor the State observed the usual trial procedures designed to specify and limit the issues under consideration. The defendants' motion charged that the statements obtained by Kennedy were involuntary and in violation of their constitutional rights in that they were denied the right to talk to a lawyer and be advised of and concerning their rights. However, the motion did not allege that Kennedy was a law enforcement official of any type, but rather asserted that he was a representative of their fire insurance carrier.

At the beginning of the hearing, counsel for the defendants orally asserted that the foregoing grounds constituted a denial of the defendants' constitutional rights under *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The State's Attorney advised the trial judge that the motion presented a legal question—whether statements made to a nonlaw enforcing official can be sup-

pressed under *Miranda* on the theory that the defendants were not advised of their constitutional rights. The judge indicated that Kennedy had appeared before the grand jury, and he believed that this was a sufficient connection to bring the case within the *Miranda* decision. Counsel for the defendants stated that he wanted to put the defendants on the stand. The judge replied that this met with the approval of the court and asked the State's Attorney if he had any objection to this procedure. The State's Attorney said that he had no objection but stated that following the testimony he would want to submit some law, and that he would not object to the defendants amending their motion if they wanted to allege that Kennedy was acting as a law enforcing officer.

Counsel for the defendants also related that he thought he had better amend his motion, although this was never, in fact, done. He advised the trial judge that there would be some evidence that Kennedy had said he was a fire marshal. The court indicated that a fire marshal was a law enforcement officer of the State. To this, counsel for the defendants replied that "He wasn't the Fire Marshal but he purported to act as such."

The defendants were then placed on the stand and testified concerning their interrogation by Kennedy in regard to their insurance claim, his intimidation of them, his refusal to permit them to talk to any attorney, his failure to advise them of their rights, and his representation that he was with the fire marshal's office. At the conclusion of the testimony, the State's Attorney reiterated that there remained before the court the legal question of whether the absence of the allegation that Kennedy

was a law enforcement officer, or of evidence other than that he represented that he was, was sufficient to sustain a motion to suppress; and he indicated that absent the legal argument then before the court, he would subpoena Kennedy.

With the case in this posture, the trial judge stated that the matter was then before him for decision, and entered an order finding that Kennedy held himself out to be connected with the fire marshal's office and was clothed with the apparent authority of that office; that the defendants were not advised by Kennedy of their right to remain silent or not be interrogated, of their right to consult an attorney, or that anything they said might be used against them; and that the statements were, thus, inadmissible under *Miranda*.

Presently, the Supreme Court has not held that a person—other than a law enforcement officer—must advise one interrogated of his constitutional rights before any statement made by the latter can be admissible against him. In *Miranda* (384 U.S., p. 444, 16 L. Ed. 2d, pp. 706, 707), it carefully limited its holding:

> "... the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused

persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. . . ."

In *Harrison* v. *United States*, 392 U.S. 219, 20 L. Ed. 2d 1047 (1968), also cited by the defendants, the majority held that testimony of the defendant at a prior trial could not be read into evidence at a subsequent trial because the defendant's earlier testimony was the result of the prior trial court erroneously admitting into evidence the inadmissible confessions. The court reasoned that, but for the use of the inadmissible confessions in evidence, the defendant would not have testified, and that the impelled resulting testimony was the fruit of the poisonous tree.

Mr. Justice White, in his dissent, notes the factor significant in the case at bar—that the procedural safeguards outlined by *Miranda* are applicable to law enforcement officials to secure the privilege against self-incrimination from wrongful Government action. In criticizing the majority in *Harrison* (392 U.S., p. 230, 20 L. Ed. 2d, p. 1056), he stated:

"The court, however, seems to overlook all of these problems in adopting an overly simple and mechanical notion of 'fruits' to which I cannot subscribe. In the view of the Court, if some evidentiary matter is causally linked to some illegal activity of the Government—linked in that broad 'but for' sense of causality which rarely excludes relevant matters

> which come later in time—it is a 'fruit' and excludable as such. This strictly causal notion of fruits is, of course, consistent with the dictum in *Silverthorne Lumber Co.* v. *United States;* 251 U.S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 24 ALR 1426 (1920), that '(i)f knowledge of (the facts) is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it. . . .'"

In *People* v. *Shipp,* 96 Ill. App. 2d 364, 239 N.E. 2d 296 (1968), the defendant was accused of disorderly conduct relating to actuating a false fire alarm in the school He was called to the principal's office and interrogated therein by the principal. He made an oral confession without being warned or informed of any constitutional rights to remain silent. At the trial, the principal was called to testify with reference to this oral confession, and the trial court sustained an objection thereto because the confession was obtained without complying with the *Miranda* requirements. The Appellate Court held that the calling of the student to the principal's office for questioning was not an arrest; that the student was not in the custody of a law enforcement official; and that these circumstances did not come within the scope of the Miranda rule.

In the case at bar, the defendants were not restrained by Kennedy, whom, as the defendants allege, they saw for the purpose of settling their insurance claim. They remained in his office, apparently, because of the promise that their insurance claim would then be settled and because of threats to the job security of the defendant, Frank J. Vlcek, if he didn't answer questions

(Appellate Court Opinion)

[1] While the testimony indicates that Kennedy held himself out to the defendants to be a fire marshal, if, in fact, he was not, then this is of no more significance under Miranda than if a bank clerk, under the guise of being a police officer, should obtain an incriminating statement from a depositor, in that the custodial procedural safeguards of Miranda have application to law enforcement officers only. In the case at bar, the defendant's counsel advised the court that Kennedy was not a fire marshal. The truth of this statement cannot be ascertained from the record.

The defendants, as indicated by their motion and statements to the court, were relying upon Miranda, and the court suppressed the statements under that authority. Yet, the admonitions required by Miranda are applicable to law enforcement officials—not private persons—even though the private persons may be posing as law enforcement officials.

[2] Under the posture in which the motion was presented, heard and decided by the trial judge, we believe that the motion should have been denied. There was neither allegation nor proof that Kennedy was a law enforcement official, or that he was acting upon the direction or with the approval of such officials. Absent this, the finding of the trial court that the defendants should have been given the admonitions required by Miranda is improper. *Broberg* v. *Mann*, 66 Ill. App. 2d 134, 137, 213 N.E. 2d 89 (1965).

The cause should be remanded for a new hearing on the defendants' motion to suppress, and they should be given leave to amend their motion if they so desire. It may be

that under proper allegations and proof, the defendants can show that Kennedy was, in fact, a fire marshal, or that any statements made by the defendants were given under conditions such as to render them otherwise involuntary or untrustworthy. We express no opinion on this since that determination should be made by the trial court after full hearing of the issues of the action as raised by proper pleadings, and under the evidence presented by both parties litigant. Therefore, the cause is reversed and remanded for further hearing consistent with the views expressed herein.

Reversed and remanded with directions.

MORAN, P.J. and SEIDENFELD, J., concur.